

Remixing Lessig

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Lawrence Lessig has a knack for being one step ahead of the curve. In 1999, he wrote *Code*, a book that presciently identified how technologies of the Internet can act as a form of “code” or regulation similar to the law itself.¹ That path-breaking book, along with numerous articles and several more books written by Lessig,² displayed an uncanny ability to anticipate some of the key issues for the Internet, even with its fast-developing nature. It is this insight into technology’s effect on society and law that has distinguished Lessig as one of the most brilliant legal thinkers of our generation. And apparently, Lessig’s clairvoyance is not limited to the Internet. Back in 2004, Lessig predicted on his blog that a relatively unknown

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¹ See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

² See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004); LAWRENCE LESSIG, *CODE: VERSION 2.0* (2005); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999); Lawrence Lessig, *Open Code and Open Societies: Values of Internet Governance*, 74 CHI.-KENT L. REV. 1405 (1999); Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403 (1996); Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743 (1995).

colleague of his from Chicago would become President.³ And, in 2008, Barack Obama did.

Not surprisingly, Lessig is one of the most cited law professors in legal academia.⁴ Yet Lessig is not one to sit on the sidelines. He is very much a participant in the policy debates that he writes and talks about: he has spearheaded reform efforts on the ground such as Creative Commons (which enables copyright holders to mass license uses of their works⁵) and the recent Change Congress initiative (which is attempting to reduce the influence of big money and special interests in Congress).⁶ Indeed, Lessig's several reform movements in copyright law—Creative Commons, Free Culture, and the Fair Use Project—have already altered copyright practices for millions of works not only in the U.S., but also in countries around the world.⁷

That is why *Remix*, Lessig's latest book, and (unfortunately) the last in the line of his copyright-focused writings, is essential reading.⁸ It provides a keen analysis of the constantly evolving applications of

³ See Lessig.org, *Barack Obama*, http://www.lessig.org/blog/2004/07/barack_obama.html (July 27, 2004, 21:00 EST); Lessig.org, *Barack Breaks the 20% Rule*, http://www.lessig.org/blog/2004/03/barack_breaks_the_20_rule.html (Mar. 20, 2004, 16:32 EST).

⁴ By Brian Leiter's survey, Lessig has been cited 2,500 times between 2000 and 2007, which would place him top in the category of intellectual property/cyberlaw (if included on that list). See Brian Leiter's Law School Rankings, *Most Cited Law Professors by Specialty, 2000-2007*, http://www.leiterrankings.com/faculty/2007faculty_impact_areas.shtml#IntellectualProperty (last visited Dec. 22, 2009). In Leiter's 2005 to 2008 rankings of "most cited" law professors, Lessig ranked 11th in the nation. See Brian Leiter's Law School Rankings, *Top Ten Law Faculties in Scholarly Impact, 2005-2008*, http://www.leiterrankings.com/faculty/2008faculty_impact.shtml (last visited Dec. 22, 2009).

⁵ For more on Creative Commons, see What Is CC?, <http://creativecommons.org/about/what-is-cc> (last visited Dec. 22, 2009).

⁶ For more on Change Congress, see Who We Are, <http://change-congress.org/who> (last visited Dec. 22, 2009).

⁷ Creative Commons has licenses for over 50 countries. See Creative Commons, International, <http://creativecommons.org/international> (last visited Dec. 22, 2009). Nearly 149 million Creative Commons licenses were used by 2006. See Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1486 (2008).

⁸ See LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008).

the Internet, which today have unleashed an incredible ability for people to engage the content they consume. Commonly known in tech circles as the shift to Web 2.0, the Internet of today increasingly gives ordinary people the ability not just to consume content, but also to “remix” it or interact with it in creations of their own. In Lessig’s techspeak, a person has the ability not just to “Read-Only,” but also to “Read-Write,”⁹ such as writing to a Facebook wall, blog post, or Twitter page, or posting a video on YouTube. Lessig believes these emerging technologies of the “remix” culture are a tremendously positive development for society because they democratize the tools for communication and creativity. Everyone can be a creator *and* publisher of content, and have an audience, too. Yet, as Lessig identifies, the hard part is figuring out ways in which this remix culture can be made to flourish, consistent or in conjunction with the goals of both our copyright system and profit-minded businesses. In *Remix*, Lessig offers the broad outlines of his vision for making remix culture—and related businesses—flourish.

This book review is an example of remix.¹⁰ It takes the central ideas from *Remix*, and transforms them with new examples and commentary of my own. Part I summarizes and critiques Lessig’s discussion of the remix and Read-Write culture, and its relationship to the sharing, commercial, and hybrid economies. Part II discusses some of Lessig’s reform proposals for our copyright system to foster a remix culture, and discusses Lessig’s recent decision to shift his focus to corruption and political reform.

I. REMIXING CULTURES + ECONOMIES

In *Remix*, Lessig analyzes the two cultures of (i) professional and (ii) amateur creation that exist today, and attempts to show how, in our Internet age, new technologies—or, as Lessig riffs John Philip Sousa’s attack on record players, the “infernal machines”—can enable “an enormous growth in economic opportunity for both the professional and the amateur, and for all those who benefit from both forms of creativity.”¹¹ Lessig’s agenda is thus both cultural and economic. Each is discussed in turn.

⁹ *Id.* at 28-29.

¹⁰ *Cf. id.* at 267 (“So if my previous books are any indication, there will be many who after reading this book will copy text from it in a highly critical review.”).

¹¹ *Id.* at 33.

A. REMIXING CULTURES: AMATEUR INTERACTIVITY AND THE RW CULTURE

1. LEARNING FROM SOUSA

The first part of *Remix* focuses on how we can regain today a culture of our past—amateur interactivity and creativity with expressive works, what Lessig characterizes as the Read-Write (“RW”) culture, meaning that the individual can do more than just read the content—the person can also “write” to it.¹² Remix is one form of writing to content in which other people’s works are transformed in a new creation, but RW culture encompasses amateur or user interactivity with content more broadly.

Lessig uses the example of John Philip Sousa’s outcry against phonographs in 1906 as an example of our past culture that valued amateur engagement with creative works.¹³ Sousa believed that the ability of machines to play songs for people simply to listen to would dampen people’s singing of those songs and learning of music.¹⁴ As Sousa decried, “The child becomes indifferent to practice, for when music can be heard in the homes without the labor of study and close application, and without the slow process of acquiring a technique, it will be simply a question of time when the amateur disappears entirely.”¹⁵

So what do kids singing songs have to do with remix today? According to Lessig, the connection is that, in both cases, “the RW creativity does not compete with or weaken the market for the creative work that gets remixed” or sung.¹⁶ Both activities of singing “the songs of the day” and remixing other people’s work involve acts of creativity for the person engaged in the endeavor that can complement the original work.¹⁷

For those fortunate enough to witness one of Lessig’s cool slide presentations, much of this material will be familiar. (And if you

¹² *Id.* at 28-29.

¹³ *Id.* at 23-25.

¹⁴ *Id.* at 25-26.

¹⁵ *Id.* at 26.

¹⁶ *Id.* at 56.

¹⁷ *Id.* at 82.

haven't seen one yet, you owe it to yourself to go to YouTube and watch.¹⁸) There's even a full-length movie inspired by Lessig and featuring part of his presentations.¹⁹ In the near future, one can easily imagine *Remix* itself may become one of the cool, new "vooks," or combination books with interactive video.

One might find it strange that the tech-savvy Lessig gives so much prominence to the old Sousa example throughout his book. To some, Sousa may sound like a Luddite, which Lessig is not. Lessig does not question the basic premise of Sousa's attack against record players for allegedly dampening singing and the learning of music. The argument raises an empirical question that probably is unanswerable today for lack of data, but one might surmise that many people sang along with the record player (as they do today with the radio and karaoke machines) and with a greater number of songs at their disposal. And some people may have been inspired to become musicians or write music after listening to music played on the "infernal machines" that they might not have otherwise been able to hear. It is not so clear that Sousa himself would have embraced today's remixing of music by DJs like Girl Talk.²⁰

Yet Lessig remixes the Sousa example. What Sousa feared was the amateur's loss of active engagement with musical works: instead of singing or performing them, amateurs can just listen to them. That passive state of receiving content like an inert receptacle (read: couch potato) is what Lessig calls the Read-Only ("RO") culture.²¹ People can only read the work, but not add to it. For much of the twentieth century, the technologies of content dissemination (phonograph, radio, tape recorder, TV, CD) really only allowed RO culture. In other words, the machines made people passive. But the Internet changed everything.²² It makes being passive passé.

Thus, the lesson of Sousa is still relevant today. As Lessig notes, "ironically for Mr. Sousa, [the] new infernal machines . . . will enable an RW culture again" and foster the kind of amateur interactivity with

¹⁸ See, e.g., TEDtalksDirector, *Larry Lessig: How Creativity Is Being Strangled by the Law*, YOUTUBE, Nov. 15, 2007, <http://www.youtube.com/watch?v=7Q25-S7jzgs>.

¹⁹ See *RiP: A Remix Manifesto*, <http://www.nfb.ca/rip-a-remix-manifesto> (last visited Dec. 22, 2009).

²⁰ LESSIG, *supra* note 8, at 11-15.

²¹ *Id.* at 28-29.

²² *Id.* at 38.

culture that Sousa lauded.²³ Lessig picks up on a key part of Sousa's testimony before Congress in which he said, "I have never known that it was unlawful to get together and sing."²⁴ The testimony was a not-so subtle rebuke of expansive views of the public performance right to reach even "singing in the streets" by the public.²⁵ Even Sousa, a famous composer of copyrighted works, recognized the need for limits to copyright, so as not to stop such amateur activity and engagement.

In reading this passage, I could not help but be reminded of the recent example of the amazing chorus of fifth graders from PS22 in Staten Island. Although the story of the PS22 chorus became famous after Lessig's book, it is exactly what Lessig's talking about.

The PS22 kids are led by their passionate chorus leader, Gregg Breinberg.²⁶ Breinberg started teaching the kids pop songs, both oldies and recent hits. In 2006, he began posting on YouTube a few videos of the chorus's rehearsals at school.²⁷ He also blogged about the chorus on his own blog, with videos of the kids embedded.²⁸

Then, at the end of 2008, the PS22 chorus had its "YouTube moment." Gossip blogger Perez Hilton saw videos of the kids' performances of Tori Amos' songs and liked them so much he started blogging about them.²⁹ Soon, Amos herself heard about them, and arranged to hear the chorus in person.³⁰ Upon hearing the kids perform one of her songs live, Amos was so moved that she was brought to tears.³¹ Said Amos, "The fact that the children are so versatile—I didn't expect this level of ability from a children's choir and was really blown away, touched, thrilled and inspired all at

²³ *Id.* at 33.

²⁴ *Id.* at 32.

²⁵ *Id.*

²⁶ Azadeh Ensha, *Staten Island School Chorus Finds Fame on YouTube*, N.Y. TIMES, Dec. 25, 2008, at A28, available at http://www.nytimes.com/2008/12/26/education/26chorus.html?_r=1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

once.”³² Stevie Nicks, of Fleetwood Mac, had a similar emotional experience hearing the kids perform her “Landslide” on video,³³ as did Suzanne Vega in watching the chorus perform her “Language.”³⁴ The accolades from the artists soon brought the kids huge media attention, appearances on *Nightline* and *Good Morning America*,³⁵ and performances for New York Mayor Michael Bloomberg and U.S. Senator Charles Schumer.³⁶ By the end of September 2009, the PS22 chorus videos generated over 9 million views on YouTube.³⁷

The sheer joy the kids’ singing has brought to people and even to the artists of the music themselves would lead one to believe that the kids’ activity is all legal under copyright law. The only problem: it’s not, or at least it’s not clear it is legal. Technically, the playing of the music video on YouTube and any performances to the public or at a public place would constitute public performances of the song, which would require permission (whether express or implied) from the copyright holders unless it is fair use, falls within one of the § 110 exemptions, or is otherwise allowed as a matter of accepted custom or informal practice.³⁸ Creating copies of the video would also implicate the right to copy. (Reread the last two sentences if you want to appreciate how uncertain and complicated copyright law is.)

³² *Id.*

³³ PS22 Chorus, *Stevie Is Happy! And We’re Ecstatic!!*, <http://ps22chorus.blogspot.com/2009/05/stevie-is-happy-and-were-ecstatic.html> (May 23, 2009, 13:46 EST).

³⁴ PS22 Chorus, *The Chorus Brings Suzanne Vega to Tears!*, <http://ps22chorus.blogspot.com/2009/03/chorus-brings-suzanne-vega-to-tears.html> (Mar. 24, 2009, 15:50 EST).

³⁵ See PS22 Chorus, *Nightline (’Nuff Said!)*, <http://ps22chorus.blogspot.com/2009/06/nightline.html> (June 10, 2009 11:04 EST); PS22 Chorus, *G! M! A!*, <http://ps22chorus.blogspot.com/2009/06/good-morning-america.html> (June 22, 2009, 22:13 EST); PS22 Chorus, *The MTV News Spot*, <http://ps22chorus.blogspot.com/2009/07/mtv-news-spot.html> (July 16, 2009, 13:35 EST).

³⁶ See PS22 Chorus, *The PS22 Chorus Is Bloom(berg)ing*, <http://ps22chorus.blogspot.com/2009/06/ps22-chorus-is-bloomberging.html> (June 30, 2009, 09:55 EST).

³⁷ See PS22 Chorus, <http://www.ps22chorus.blogspot.com> (last visited Dec. 22, 2009).

³⁸ See 17 U.S.C. § 101 (2006) (definitions of “public” and “performance”); *id.* § 106 (right of public performance); *id.* § 107 (fair use); *id.* § 110(1), (4).

Although there is a clear exemption for singing “in a classroom or similar place devoted to instruction” for learning’s sake,³⁹ the publicly available videos of the kids’ singing on YouTube fall outside this classroom exemption.

So is it fair use? Hard to say without a court ruling, given how fact-specific the doctrine is. In other scholarship, I have called this situation a gray area of copyright law, which is often determined by *informal* copyright practices among the respective parties.⁴⁰ Here, because a number of the artists whose music is being performed have openly condoned the kids’ singing of their music on videos, and no copyright holder is complaining about the kids’ activity, the activity arguably involves a legitimate informal practice that should be allowed to continue—and should be encouraged.⁴¹

However, I admit informal copyright practices are a bit messy and, well, *informal*. As Lessig notes, uncertainty plagues formal copyright law in ways that can hurt creativity.⁴² Informal practices here lack the certainty and security that a clear legal ruling or rule would offer. For the PS22 chorus, this lack of security led to YouTube’s *termination* of the chorus’s YouTube channel and removal of *all* of their videos from YouTube for “terms of use” violations.⁴³ To get a picture of what happens in such a termination, just imagine your TV screen going black. All of PS22 chorus’s videos, singing, and joy vanished from YouTube.⁴⁴ Poof.

After discussions with YouTube, the teacher Breinberg convinced YouTube to allow him to repost the music videos on a new channel, but one that lost the chorus’s past 7 million views and distinctions on

³⁹ *Id.* § 110(1).

⁴⁰ See Lee, *supra* note 7, at 1459.

⁴¹ For more on informal copyright practices, see *id.* at 1493-96.

⁴² LESSIG, *supra* note 8, at 262.

⁴³ The Utube Blog, *YouTube Suspends the Account of PS22 Chorus – Why?*, <http://theutubeblog.com/2009/07/11/youtube-suspends-the-account-of-ps22-chorus-why> (July 11, 2009).

⁴⁴ Interestingly, a video site called SchoolTube is devoted to school children and educators (K-12). See SchoolTube, <http://www.schooltube.com> (last visited Dec. 22, 2009). Breinberg also posted his videos there. PS22 Graniteville channel, <http://www.schooltube.com/Organization/OrganizationHome.aspx?oid=174772> (last visited Sept. 19, 2009).

YouTube that the high viewership brought.⁴⁵ Breinberg, being very “diplomatic,” called YouTube’s action all a “mistake.”⁴⁶ My guess is that YouTube removed the videos on its own initiative for copyright concerns (perhaps as a result of its automated content ID removal system or its community flagging system),⁴⁷ without any complaint from a copyright holder. I have heard of other examples in which well known amateur creators on YouTube experienced similar terminations and removal of videos, only to have to plead with YouTube to reconsider its decision. My suspicion is supported by the fact that, several months later, YouTube eventually reinstated Breinberg’s *entire* original YouTube account, including his PS22 videos and total view count.⁴⁸ In short, the termination of PS22’s YouTube account was a mistake, but one made possible because of the uncertain copyright status of the kids’ singing of copyrighted songs. To some people, even kids singing songs at school might appear to be infringement if performed on a YouTube video. Indeed, some copyright experts would consider all of it flat-out infringement.

The PS22 chorus’s saga is one that Sousa—and Lessig—would appreciate, and parts of it, decry. No doubt, they would applaud the learning and passion for music of the fifth graders in the chorus, who are largely minority students from lower income families in a public school system that has faced budget cuts (with many music programs cut entirely in other schools).⁴⁹ In Sousa’s day, kids sung on the streets. Today, they sing on YouTube. It is downright tragic that copyright law is so uncertain (or, if not uncertain, so restrictive) that

⁴⁵ See *supra* note 43.

⁴⁶ *Id.*

⁴⁷ Typically, when a copyright holder complains to YouTube in a formal DMCA notice, YouTube indicates the copyright holder has filed a complaint against the video (a notice that is viewable when the video is played). In PS22’s case, no such notice was provided. And the number of artists who have openly supported the PS22 chorus and the fact that YouTube allowed the videos to be reposted make it extremely unlikely that anyone filed a DMCA notice against the chorus’s videos.

⁴⁸ The Utube Blog, *YouTube Reinstates Terminated Channel of PS22 Chorus*, <http://theutubeblog.com/2009/08/26/youtube-reinstates-terminated-channel-of-ps22-chorus> (Aug. 26, 2009).

⁴⁹ See Jason Gay, *Gaga for P.S. 22*, N.Y. MAG., July 2, 2009, available at <http://nymag.com/arts/popmusic/features/57730/?imw=Y&f=most-viewed-24h5>; Steven Roberts, *PS22 Chorus Becomes Famous, Focused Through Pop-Song Covers*, MTV, July 16, 2009, <http://www.mtv.com/news/articles/1616356/20090715/story.jhtml>.

the kids' innocent singing of music, even copyrighted music, might be deemed a "terms of use" violation or copyright infringement. After all, don't we want our children to learn how to sing and perform together in ways that can inspire others to as well? And shouldn't copyright law openly allow for such learning *and* sharing, instead of leaving it to a murky gray area? Sousa would be shaking his head.

The whole point of the Copyright Clause is to set up a copyright system that "promote[s] the Progress of Science," meaning *learning*.⁵⁰ Of course, that doesn't mean schools have a blanket exemption from copyright. Nor does it mean that copyright should govern every single use of copyrighted works by schools or children. If our copyright system is truly to promote learning, some breathing room is necessary for at least some educational or learning activities that do not require payment of copyright licenses. The making and sharing of the PS22 videos seem like a good candidate for the kind of educational breathing space that our society should embrace—a "teachable moment," if you will. Educators recognize that learning is often most effective when it comes through collaboration, which presupposes an ability to share and participate in the fruits of other people's learning.⁵¹ For example, other school children across the country and even other parts of the world might learn from the singing of the PS22 chorus students, such as their harmony, arrangements, and sheer passion for music. One can imagine other school choruses remixing the PS22 videos with their own takes of the songs. But none of this learning would be possible if the PS22 videos could not even be shared. Moreover, I suspect that the PS22 chorus videos are, in the long run, more about learning how to work together and to gain self-confidence and self-esteem as adolescents than they are about singing. Don't get me wrong, the singing of the chorus is beautiful. But who knows if any of the children will grow up to be singers? That is not the aim. What the school chorus has provided the children instead is an invaluable lifelong lesson in working and growing together to achieve something truly great, as judged by millions in the public at large. Without the ability to share with the public, that lesson would be diminished, if not destroyed.

⁵⁰ U.S. CONST. art. I, § 8, cl. 8.

⁵¹ See generally Roberta K. Thyfault & Kathryn Fehrman, *Interactive Group Learning in the Legal Writing Classroom: An International Primer on Student Collaboration and Cooperation in Large Classrooms*, 3 J. MARSHALL L. REV. 135, 139-40, 147-48 (2009) (discussing collaborative learning).

True, some may argue that the school children can share their singing with the public as long as they pay for a license of the copyrighted music, or else perform music that is no longer copyrighted (meaning works written before 1923). But such a license for a public school chorus (especially in districts where music programs have been cut entirely) would be cost prohibitive. And to relegate the school chorus to sing songs written before 1923—say, “Camptown Races” or “Old MacDonald Had a Farm”—would destroy the whole value of engaging students with contemporary music that is relevant to their lives.

At the end of *Remix*, Lessig argues there is a better way for copyright law to deal with amateur creativity by exempting noncommercial amateur remixes. Lessig would implement a system in which some amount of compensation would go to the songwriters whose music is performed on YouTube.⁵² If one accepts that approach, the hard part is figuring out who should pay. YouTube seems a likely candidate, but, as discussed below, YouTube has not been able to generate much revenue. And, while YouTube has struck deals with various music labels for certain music used on YouTube, including in user-generated content and YouTube videos,⁵³ it is not clear whether the songs used by the PS22 chorus or its singing even falls within those agreements. In any event, although our current copyright system acknowledges no special treatment for kids, I believe Lessig is right to begin to wonder how our copyright law affects our kids. Perhaps Lessig’s rhetoric about copyright law turning our kids into criminals may strike some as exaggerated at times,⁵⁴ but the basic point Lessig makes is one that our society must confront. Do our copyright laws discourage our kids from utilizing today’s technologies and engaging in creative endeavors that would benefit not only them, but us all?

⁵² LESSIG, *supra* note 8, at 256.

⁵³ See, e.g., Jennifer LeClaire, *YouTube and Warner Music Kiss and Make Up*, NEWSFACTOR, Sept. 29, 2009, at http://www.newsfactor.com/story.xhtml?story_id=69238&full_skip=1#; The Utube Blog, *EMI, the Last of the 4 Major Labels, Enters YouTube’s Fold*, <http://theutubeblog.com/2007/05/31/emi-the-last-of-the-4-major-labels-enters-youtubes-fold> (May 31, 2007).

⁵⁴ LESSIG, *supra* note 8, at xviii. But see *Blogger Gets Probation for Guns N’ Roses Album Leak*, CBCNEWS.CA, July 15, 2009, <http://www.cbc.ca/arts/music/story/2009/07/15/gnr-chinese-democracy-leak-sentence.html>.

2. DEFINING REMIX AND ITS BENEFITS

Lessig shows how digital technologies have opened a vast potential for the RW or remix culture,⁵⁵ especially for ordinary people in amateur endeavors. Lessig is particularly effective in dissecting what “remix” is. Writers are able to use quotations from other works to enhance their own writing.⁵⁶ Anyone who has read an effective essay or legal brief can appreciate the power of an apt quote. Quotation of text is a form of remix,⁵⁷ a practice that no one in our society ever questions should be freely allowed. As Lessig writes:

Writing. . . is the ultimate form of democratic creativity We teach everyone to write—in theory, if not in practice. We understand quoting is an essential part of that writing. It would be impossible to construct and support that practice if permission were required every time a quote was made. That freedom to quote, and to build upon, the words of others is taken for granted by everyone who writes.⁵⁸

Yet, for some reason, the same freedom to remix passages of works is not commonly recognized today when it comes to music or videos.⁵⁹ In the view of some courts and copyright industries, text is freely open to remix, but music and videos are not.⁶⁰ No “sampling” allowed.⁶¹ Lessig is right to puzzle over whether this differential treatment of media is based on any defensible principle. Why can I quote from Hemingway, but not from Sam Wood’s film version of Hemingway?⁶²

⁵⁵ LESSIG, *supra* note 8, at 38.

⁵⁶ *Id.* at 51-53.

⁵⁷ *Id.* at 51.

⁵⁸ *Id.* at 52-53.

⁵⁹ *Id.* at 53.

⁶⁰ *Id.* at 53-54.

⁶¹ See *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 2004) (“Get a license or do not sample.”).

⁶² LESSIG, *supra* note 8, at 53.

It can't be that Hemingway was somehow less deserving of broader copyright protection of his novel than the filmmaker Wood was for his film of Hemingway's masterpiece, *For Whom the Bell Tolls*. If anything, one would think Hemingway, the creator of the original work, ought to receive the broader copyright protection. After all, without Hemingway's genius, there would be no movie.

Lessig posits that one possible explanation for the differential treatment between quoting text and other media is that it is simply an historic artifact based on the wider availability of people engaging in writing (with pen and paper) versus creating their own records or videos, given the crude state of the technologies that did not allow people to remix songs or videos (at least not without great cost and expensive equipment).⁶³ "While writing with text is the stuff that everyone is taught to do, filmmaking and record making were, for most of the twentieth century, the stuff that professionals did."⁶⁴ But now, with the advances in technology, all of this has changed. Anyone with a laptop or smartphone can create a film or make a sound recording. Indeed, the new iPhone has a quite sophisticated, but user-friendly editing tool for its video camera that is as simple as pointing one's finger.⁶⁵ The next Sam Wood may be the kid next door with an iPhone.

So what happens when everyone can create videos and sound recordings on their computers as easily as they can write? Should quoting still be limited to writing with text? Not in Lessig's view. Lessig characterizes the democratizing effect of today's new technologies as enabling "a capacity for a generation to speak."⁶⁶ Some critics might view this as panglossian. Yet, I think the evidence is mounting that Lessig is correct, especially for video and the power of communication spurred on by the likes of YouTube and other video-sharing sites. Even though the capability for sharing online video has been around only since 2005, we have already witnessed countless ways in which online video has enhanced people's ability to communicate to the world.

⁶³ *Id.* at 54, 83.

⁶⁴ *Id.* at 54.

⁶⁵ See MG Siegler, *It Really Should Have Been Called the iPhone 3G V – For Video*, TECHCRUNCH, June 20, 2009, <http://www.techcrunch.com/2009/06/20/it-really-should-have-been-called-the-iphone-3g-v-%E2%80%94-for-video>.

⁶⁶ LESSIG, *supra* note 8, at 56.

While Lessig offers several examples of his favorite mashup videos,⁶⁷ let me offer a few examples of my own. I take a fairly broad view of “mashup” videos to include any video that incorporates at least some third-party footage into a new video (even when mixed in with one’s own original creations).⁶⁸ A mashup video quotes, in effect, from other videos. After the Iranian presidential election in 2009, an amateur video captured raw footage of a woman named Neda as she was shot and killed.⁶⁹ The graphic footage was both copied and remixed into other videos,⁷⁰ which soon drew media attention around the world and helped to galvanize the Iranian protesters.⁷¹ Likewise, in our own presidential election in 2008, videos prepared by the candidates and by citizens (some of them mashups) totaled in the thousands, generating many millions of views.⁷² Indeed, candidate Barack Obama’s own videos generated the most views on YouTube of all the candidates—totaling 94.5 million views of over 1,800 videos by Election Day.⁷³ Some of Obama’s most effective campaign videos were essentially mashup videos that took footage of John McCain speaking—who can forget McCain saying “the fundamentals of the

⁶⁷ *Id.* at 71-76.

⁶⁸ Sometimes, mashup artists string together footage from several third parties, but incorporate none of their own footage. Other times, artists mix third-party footage with their own footage. I consider both of these examples as mashup videos.

⁶⁹ See Nazila Fathi, *In a Death Seen Around the World, a Symbol of Iranian Protests*, N.Y. TIMES, June 23, 2009, at A1, available at <http://www.nytimes.com/2009/06/23/world/middleeast/23neda.html>.

⁷⁰ See, e.g., AliJahanii, *Neda Agha Soltan, Killed 20.06.2009, Presidential Election Protest, Tehran, IRAN*, YOUTUBE, June 22, 2009, <http://www.youtube.com/watch?v=76W-oGVjNEc> (over 728,241 views by Dec. 22, 2009); Current, *Neda’s Death Becomes Iranian Symbol: News Current*, YOUTUBE, June 22, 2009, <http://www.youtube.com/watch?v=ZmrB2FOLqiE> (over 144,132 views by Dec. 22, 2009); hootan2323, *Neda Agha Soltan—We Will Never Forget You, We Promise*, YOUTUBE, June 22, 2009, <http://www.youtube.com/watch?v=p-7Tgvo8iso> (over 10,770 views by Dec. 22, 2009).

⁷¹ See Fathi, *supra* note 69, at A1 (“The bloody video of her death on Saturday, circulated in Iran and around the world, has made Ms. Agha-Soltan, a 26-year-old who relatives said was not political, an instant symbol of the antigovernment movement.”).

⁷² At the start of the primaries in January 2008, the candidates had posted over 3,300 videos on YouTube gaining nearly 43 million views. See Lee, *supra* note 7, at 1523.

⁷³ See Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 267 (2009).

economy are strong”— and incorporated them into Obama’s own commercials.⁷⁴ Of course, the McCain camp had its own campaign videos that at times remixed footage of Obama, even comparing him to the “celebrity” of Paris Hilton.⁷⁵ Citizens also participated in the 2008 election by creating videos of their own to support their candidates or attack the opponents; perhaps the most well known were the “Obama girl” videos (some of which were mashups), which generated millions of views during the campaign.⁷⁶

These examples all make manifest how important video is today to politics, as well as to the ability to make political statements. Lessig’s argument for allowing technology to enable “a capacity for a generation to speak” is not just about creating entertainment or videos that tickle one’s fancy. Remix carries profound importance for political discourse in the twenty-first century. Our Founding Fathers had pamphlets to make political statements. We have videos.

I witnessed this firsthand watching a mashup video created by Martin Macias, Jr., at the Mashup/Remix 2009 symposium at the Moritz College of Law. Macias, then only a high school student, created an incredibly powerful mashup video of different political remix videos created by him and other teenagers.⁷⁷ The videos had powerful images, at times synchronized with ironic music or commentary, dissecting various hot button issues such as war, police brutality, fast food and obesity, U.S. Army marketing to Latinos, the diamond trade, and contamination of the environment.⁷⁸ The videos, all created by teenagers, displayed a quite sophisticated ability of criticism, storytelling, juxtaposition, irony, and analysis.

⁷⁴ See, e.g., BarackObamadotcom, “*Fundamentals*” Ad, YOUTUBE, Sept. 15, 2008, <http://www.youtube.com/watch?v=6reQLzgywzk>; BaracacObamadotcom, “*Seven*” – TV Ad, YOUTUBE, Aug. 21, 2008, <http://www.youtube.com/watch?v=vpmFd25tRqo>.

⁷⁵ See, e.g., JohnMcCaindotcom, *Celeb*, YOUTUBE, July 30, 2008, http://www.youtube.com/watch?v=oHXYsw_ZDXg; JohnMcCaindotcom, *The One*, YOUTUBE, Aug. 1, 2008, <http://www.youtube.com/watch?v=mopknolPzM8>; JohnMcCaindotcom, *McCain Is Right*, YOUTUBE, Sept. 28, 2008, <http://www.youtube.com/watch?v=Ec3aC8ZJZTc>.

⁷⁶ See Barelypolitical channel, Most Viewed Videos <http://www.youtube.com/profile?user=barelypolitical&view=videos&sort=v> (last visited Dec. 22, 2009) (top two Obama girl videos over 29 million views).

⁷⁷ See Youthlab2007, *Political Remix Video*, YOUTUBE, March 11, 2009, <http://www.youtube.com/watch?v=aee6ztpZ97s>.

⁷⁸ *Id.*

As Lessig identifies, the digital tools that today enable people to create videos, music, and text have made these creations “an increasingly dominant form of ‘writing.’”⁷⁹ The written word in simple text is so twentieth century. More powerful in the twenty-first century is *video with accompanying words or music*.

One need only think of Al Gore’s *An Inconvenient Truth*, which had a greater impact through slide presentation than in print, and even greater impact through video. The multimedia form, especially when distributed through the Internet, is probably the most powerful way for someone to reach the masses today. As Lessig writes:

[T]he Internet and digital technologies opened these media to the masses. Using the tools of digital technology—even the simplest tools, bundled into the most innovative modern operating systems—anyone can begin to “write” using images, or music, or video. And using the facilities of a free digital network, anyone can share that writing with anyone else. As with RW text, an ecology of RW media is developing. It is younger than the ecology of RW texts. But it is growing more quickly, and its appeal is much broader.⁸⁰

Lessig’s case is so convincing on this central point that the reader may be left wanting more. While Lessig explains the educational value of teaching our kids how to utilize the digital tools for remix, and provides several examples of interesting projects in schools,⁸¹ perhaps it would have been helpful to round out that discussion with a proposal for incorporating some form of media studies in grade schools and high schools. A remix culture should include, in effect, a remix *curriculum* on this important form of writing. I even think a remix curriculum would be beneficial for law students. Not only would it exercise their right brains (too often neglected in law school education), but it would also train them in the art of persuasion through slides, video, or other media—all potentially useful for courtroom demonstrations, presentations to clients, and even

⁷⁹ LESSIG, *supra* note 8, at 69.

⁸⁰ *Id.*

⁸¹ *See, e.g., id.* at 80-81.

mobilizing support in political or legislative causes. Just think again of Barack Obama and his use of new media during the campaign.⁸²

B. REMIXING ECONOMIES: COMMERCIAL, SHARING, AND HYBRID ECONOMIES

1. HYBRIDS OF COMMERCIAL AND SHARING ECONOMIES

The second half of *Remix* is devoted to economics. Lessig attempts to explain why “[e]very interesting Internet business will be a hybrid” between commercial and sharing economies, or practices of exchange.⁸³ Some practices of Internet companies will involve commercial transactions, while others will involve things shared with or by the public for free—and potentially free for remixing. Remix is an activity that is often facilitated by a sharing economy, insofar as remixing is easier to undertake if the underlying content for remixes is shareable among amateur creators.⁸⁴ Lessig believes that commercial Internet companies will have greater incentives to include sharing economies, including those that facilitate amateur remix for RW culture.⁸⁵ By recent press reports of the growing research in this area for businesses, Lessig appears to be right.⁸⁶

The dividing line between a commercial economy and a sharing one is money: “Of all the possible terms of exchange within a sharing economy, the single term that isn’t appropriate is money.”⁸⁷ If you pay people to be your friends, they aren’t really your friends.⁸⁸ Lessig identifies both “thick” and “thin” sharing economies; the latter involves sharing in which the motivation is more to benefit the other

⁸² See Ellen McGirt, *How Chris Hughes Helped Launch Facebook and the Barack Obama Campaign*, FAST COMPANY, Mar. 17, 2009, <http://www.fastcompany.com/magazine/134/boy-wonder.html>.

⁸³ LESSIG, *supra* note 8, at 116-17.

⁸⁴ See *id.* at 254 (discussing amateur and professional remix).

⁸⁵ *Id.* at 116.

⁸⁶ See Steve Lohr, *The Crowd Is Wise (When It’s Focused)*, N.Y. TIMES, July 19, 2009, at BU4, available at http://www.nytimes.com/2009/07/19/technology/internet/19unboxed.html?_r=1.

⁸⁷ LESSIG, *supra* note 8, at 118.

⁸⁸ *Id.*

person (“thee”), while the former, sharing to benefit oneself (“me”).⁸⁹ Some Internet sites like Wikipedia, the online encyclopedia, operate with a thick-sharing economy in which participants “owe” a certain set of values or norms, e.g., neutrality or impartiality, in their contributions to the overall project.⁹⁰ By contrast, profit-maker Amazon operates with a thin-sharing economy.⁹¹

Lessig’s book is chock-full of illuminating examples (too numerous to summarize) that support his theory of the sharing economy. The one that I loved the most was Lessig’s encounter with a teenager sitting next to him on a plane who had a collection of several hundred DVDs, apparently illegally copied.⁹² Breaking his rule of never initiating conversation with passengers on a plane, Lessig asked the kid about his collection,⁹³ but refrained from lecturing the kid about not breaking the law. Eventually, to kill time on the plane, Lessig asked to rent one of the movies for \$5.⁹⁴ Bad idea. In the teenager’s mind, Lessig had crossed a line. With an expletive deleted (here), the teenager said, “You think I do this for money? I’m happy to lend you one of these. But I don’t take *money* for this.”⁹⁵ The line that Lessig crossed is injecting money into a sharing economy. Money corrupts sharing. In a sharing economy, money makes no sense.

Thus, an important facet of the sharing economy is that “relations are insulted by the simplicity of price.”⁹⁶ To return to my example of the PS22 chorus, just think if someone offered to pay the fifth graders to sing and create YouTube videos. That would destroy the whole charm, and purity, of their performances. The fifth graders are singing, not for money, but for their love of (learning) music, which they are happy to share with others for free. But, of course, YouTube is a commercial site, in the sense that YouTube itself is trying to make money. And, although none has said so publicly, it is conceivable

⁸⁹ *Id.* at 152.

⁹⁰ *Id.* at 155.

⁹¹ *Id.*

⁹² *Id.* at 144.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 145.

⁹⁶ *Id.*

(though probably unlikely) that some of the copyright holders of the songs may desire some compensation for the kids' use of their songs. So what happens when a noncommercial singing group like the PS22 chorus shares its videos on YouTube for free?

Enter the *hybrid economy*, a cross between the sharing and the commercial. Lessig's most provocative discussion in *Remix* is his analysis of hybrids. "The hybrid is either a commercial entity that aims to leverage value from a sharing economy, or it is a sharing economy that builds a commercial entity to better support its sharing aims."⁹⁷ Software company Red Hat—whose profits totaled \$28.7 million in the first quarter of 2009⁹⁸—is an example of a commercial entity that has successfully leveraged value from the public sharing of improvements in open source software for GNU/Linux.⁹⁹ Another example of a commercial-minded hybrid is YouTube, a commercial entity that attempts to leverage, in part, the sharing of millions of amateur videos created for free by its users.¹⁰⁰ By contrast, Craigslist started out with a sharing economy (of free ads for the San Francisco community) that eventually monetized a small portion of its business to expand its free ads to other cities as well.¹⁰¹

Lessig believes this third economy, the hybrid economy, "will dominate the architecture for commerce on the Web."¹⁰² Indeed, in Lessig's view, "[e]very interesting Internet business is now, or is becoming, a hybrid."¹⁰³ Why is this so? Part of the reason is technological: the technologies of the Internet increasingly enable sharing,¹⁰⁴ consistent with how the code of the Internet itself developed.¹⁰⁵ Another part is practical: the past successes in open

⁹⁷ *Id.* at 177.

⁹⁸ See David Ranii, *Red Hat Revenue Surges 11%*, THE NEWS & OBSERVER, June 25, 2009, available at <http://www.newsobserver.com/business/nc/story/1582512.html>.

⁹⁹ LESSIG, *supra* note 8, at 181-83.

¹⁰⁰ *Id.* at 194-95.

¹⁰¹ *Id.* at 188-89.

¹⁰² *Id.* at 177.

¹⁰³ *Id.* at 178.

¹⁰⁴ *Id.* at 176.

¹⁰⁵ *Id.* at 164.

source software have illuminated the benefits of having a diversity of mass collaborators in a business endeavor.¹⁰⁶ Crowd-sourcing, or tapping into the wisdom of the crowds, can summon a wealth of diverse talents that no single firm could match.¹⁰⁷ I would add a third reason, which is cultural: people today expect more sharing on the Internet as more technologies of sharing have been offered. “Social media,”¹⁰⁸ as these technologies have been described, raise people’s expectation to share things with each other in a social network—without the concern or corruption of money.

2. HOW HYBRIDS CAN BE SUCCESSFUL

In Lessig’s view, it is too soon to say anything definitive on how hybrid economies and businesses will play out.¹⁰⁹ He does offer a few observations, though, on what we have seen so far. Lessig believes, for example, that commercial and sharing economies—parallel economies—can coexist for the same works, such as in the recent practices of some musicians (like Radiohead and NIN) who offer their music both for free and for sale.¹¹⁰ Drawing on Eric von Hippel’s and Yochai Benkler’s works, Lessig believes commercial entities will have strong incentives to become hybrids attempting to leverage some form of sharing economy, such as outsourcing innovation by allowing people to freely build on their existing programs.¹¹¹

Open source software is a prime example, but I think even closed, proprietary software can leverage the hybrid in more limited forms of sharing. Just think of all the amazing third-party applications developed for the iPhone, Facebook, and Twitter. All three companies “share” for free their Advanced Programming Interfaces (APIs) with programmers, though potentially with some restrictions (as evidenced by Apple’s recent spat with Google in allegedly rejecting Google Voice

¹⁰⁶ *Id.* at 165-66.

¹⁰⁷ *Id.* at 178, 221-22.

¹⁰⁸ See Mark Hopkins, *Just What Is Social Media, Exactly?*, MASHABLE, Nov. 18, 2008, <http://mashable.com/2008/11/18/social-media-defined>.

¹⁰⁹ LESSIG, *supra* note 8, at 225.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 228-29.

for the iPhone).¹¹² Third-party developers have added great value to each application or device. By spring 2009, the iPhone alone had over 25,000 applications—in just eight months—developed by third parties (much of them offered for free to the public).¹¹³ Although probably many of these developers are seeking to make money (and thus would follow a commercial, not sharing, economy), a number probably are satisfied with just making a cool application and sharing it with others. The application developers may be hybrids themselves. Popular local review applications like Urbanspoon and Yelp rely on their many users to post amateur reviews of restaurants and other businesses, even with photos.¹¹⁴ The users share their reviews all for free—which, nevertheless, redounds to the benefit of the commercial entities Urbanspoon and Yelp.

Lessig puts his finger on probably the biggest challenge for hybrid economies: how to mediate successfully between the sharing and commercial economies.¹¹⁵ “If the hybrid feels too commercial, that saps the eagerness of the volunteers to work.”¹¹⁶ Once that happens, disgruntled users shout “sellout” at the company. This problem affects many Internet startup companies that start out more with a spirit of a sharing community, but eventually focus on trying to make money. Lessig posits that, to work effectively, hybrids should maintain a “conceptual separation” between the sharing and commercial parts.¹¹⁷ Lessig suggests that hybrids adopt principles of

¹¹² See Apple, *Develop for iPhone OS 3.0*, <http://developer.apple.com/iphone/program/sdk> (last visited Dec. 22, 2009); Facebook Developers, *Build Social Applications on Facebook Platform*, <http://developers.facebook.com> (last visited Dec. 22, 2009); Twitter, *Twitter API Documentation*, <http://apiwiki.twitter.com/Twitter-API-Documentation> (last visited Dec. 22, 2009); see also Posting of Saul Hansell to N.Y. TIMES Bits Blog, *Google Says Apple Flatly Rejected Voice App for iPhone*, <http://bits.blogs.nytimes.com/2009/09/18/google-says-apple-flatly-rejected-voice-app-for-iphone/?hp> (Sept. 18, 2009, 15:59 EST).

¹¹³ See Posting of Matthew Miller to ZDNet blog, *Number of iPhone Apps Surpass Windows Mobile; 8 Months Versus 9 Years*, <http://blogs.zdnet.com/cell-phones/?p=851> (March 5, 2009).

¹¹⁴ See Posting of Saul Hansell to N.Y. TIMES Bits Blog, *Why Yelp Works*, <http://bits.blogs.nytimes.com/2008/05/12/why-yelp-works> (May 12, 2008, 15:40 EST).

¹¹⁵ LESSIG, *supra* note 8, at 231-43.

¹¹⁶ *Id.* at 232.

¹¹⁷ *Id.* at 178.

fairness, moderation, and transparency when dealing with their sharing economies and users.¹¹⁸

Although Lessig is right that it's too early to say how hybrid economies will play out, it is interesting to speculate. The \$64,000 question for the commercial-minded hybrid is how to make profits, particularly in those areas of commerce that are central to the remix culture in which they compete with pure commercial entities.

Let's reconsider YouTube. Though it started out in 2005 trying to cultivate user-generated content of amateurs, in the past year it has attempted to commercialize the site with professional content from Hollywood—even to the point of alienating some in the YouTube community.¹¹⁹ To some, YouTube seems no longer interested in providing amateurs with remix tools or a platform for user-generated content. Perhaps not coincidentally, YouTube cofounder Steve Chen, interviewed by Lessig for *Remix*, has since left the company to work for Google.¹²⁰ The founders' original vision for YouTube may be changing as well.

Though YouTube started out with a heavy focus on trying to cultivate both community and a sharing economy, it has received stiff competition from a purely commercial entity called Hulu. Hulu, the so-called "YouTube killer", is a joint venture between Universal NBC and Fox that contains only professional videos ("premium content") and that has become the darling of the online video industry, at least among advertisers.¹²¹ As a result of upstart Hulu's initial success, YouTube, in many ways, has tried to become more like Hulu and distribute professional content, in order to address the difficulties it

¹¹⁸ *Id.* at 234-35.

¹¹⁹ See, e.g., SaveYouTube, *YouTube Will Soon Go Through Drastic Changes!*, YOUTUBE, Apr. 3, 2009, <http://www.youtube.com/watch?v=nPECy7qwWgY>; Iceflow Studios, *YouTube Is Changing: Be Prepared*, YOUTUBE, Apr. 14, 2009, <http://www.youtube.com/watch?v=wD9zA3dVIBI>.

¹²⁰ See *YouTube Co-Founder Steve Chen Leaves Company But Remains with Google*, INT'L BUS. TIMES, July 21, 2009, <http://www.ibtimes.com/articles/20090630/youtube-co-founder-steve-chen-leaves-company-but-remains-with-google.htm>.

¹²¹ See Posting of Scott Hansell to N.Y. TIMES Bits Blog, *Why Hulu Succeeded as Other Video Sites Failed*, <http://bits.blogsnytimes.com/2009/07/08/why-hulu-succeeded-as-other-video-sites-failed> (July 8, 2009); Don Reisinger, *Can Hulu Be a Bigger Business Than YouTube?*, TECHCRUNCH, Sept. 1, 2008, <http://www.techcrunch.com/2008/09/01/can-hulu-be-a-bigger-business-than-youtube>.

has had in generating advertising revenues since its founding.¹²² Part of the problem appears to be that few advertisers would like to advertise alongside the amateur user-generated content on YouTube, which may be more risqué, edgy, and controversial than professional content.¹²³ Making matters even more volatile, Hulu is reportedly considering switching to a pay model for its premium content.¹²⁴

The YouTube example, which is still unfolding, raises more questions than answers. One question is whether YouTube should become more like Hulu or a professional content site if YouTube can make more money that way. Under Lessig's theory, making money appears to be the ultimate criterion of success for the commercial hybrids that leverage sharing economies,¹²⁵ so the answer appears to be yes. Another question is whether the ratio of commercial to sharing economies in a hybrid matters, and, if so, does it matter differently for startups versus established companies?

For example, a commercial hybrid that devoted 99% of its resources to sharing economies, and only 1% to commercial transactions, probably would not make a profit. As is typical with startups, YouTube started out this way. YouTube first developed a site for people to share videos for free. The business model and advertising came second—some would say they are still absent. Now, with stiff competition from Hulu (and with YouTube's acquisition by Google), the priorities have flipped. YouTube is much more concerned about the commercial side. By contrast, some companies, such as Microsoft, start out from the beginning much more on the commercial side and then branch out with sharing. Even Microsoft has entered the sharing economy, however modestly.¹²⁶ These examples raise the question whether it's better for a commercial hybrid to focus more on the commercial or sharing economy at the start of its business.

¹²² See Adam Ostrow, *Coming Soon: The Hulufication of YouTube?*, MASHABLE, Mar. 30, 2009, <http://mashable.com/2009/03/30/youtube-redesign>; Jessi Hempel, *Google (Still) Loves YouTube*, FORTUNE, Aug. 17, 2009, at 37-42; Jessica E. Vascellaro, *YouTube Pumps More Ads Into Lineup*, WALL ST. J., Aug. 20, 2009, at B1.

¹²³ See Richard MacManus, *Report: Hulu a More Successful Business than YouTube*, READWRITEWEB, Sept. 3, 2008, http://www.readriteweb.com/archives/report_hulu_youtube_advertising.php.

¹²⁴ Dawn C. Chmielewski & Meg James, *Will Hulu Make You Pay to Watch?*, L.A. TIMES, Oct. 5, 2009, <http://www.latimes.com/business/la-fi-ct-hulu5-2009oct05,0,980649.story>.

¹²⁵ LESSIG, *supra* note 8, at 178, 233.

¹²⁶ See *id.* at 200-01.

I don't have the answers to these questions; nor does *Remix*. But Lessig's insights into hybrid economies break new ground for those thinking about Internet businesses. Lessig is one of a growing number of theorists to recognize the importance of understanding the hybrid model in businesses.¹²⁷ Again, Lessig has his finger on the right pulse. Any Internet company would be well served by reading these chapters of *Remix*, and thinking about how to leverage sharing economies for their own businesses. As Lessig suggests, we have only scratched the surface of the hybrid's growth.

II. REMIXING LESSIG: FROM COPYRIGHT TO POLITICAL REFORM

If Lessig is right that the economy will see a growth of innovative hybrid businesses that benefit directly from the sharing and remixing of content, the logical question to ask is how should the law deal with this growth. The end of *Remix* offers five proposals for changing copyright law to foster RW creativity in the twenty-first century: (1) deregulating noncommercial amateur remix by making it fall outside of copyright law; (2) returning to the original copyright system's requirement of renewal of copyright during the term of copyright; (3) simplifying the copyright law so people can understand it, including understandable exemptions to complement fair use; (4) returning to the original copyright system's nonregulation of copies; and (5) decriminalizing file sharing by allowing it with compensation to the artists through either a tax or a voluntary blanket licensing system (as proposed by others).¹²⁸ Lessig believes that these proposals, although not intended as a comprehensive plan, "would go a long way toward making the system make more sense of the creative potential of digital technologies."¹²⁹

It goes beyond the scope of this review to examine each one of these proposals in turn. I do especially like the first proposal, deregulating noncommercial amateur remixes, which complements the third proposal of simplifying copyright law. It is a disservice to the American public to have a copyright law that is harder to discern—in terms of following its proscriptions—than the tax code. Having a specific exemption for noncommercial amateur remixing (and other creative activities), in addition to the fair use provision, would be

¹²⁷ See Lohr, *supra* note 86, at BU4.

¹²⁸ LESSIG, *supra* note 8, at 254-73.

¹²⁹ *Id.* at 253.

better than what we have now. Such an exemption would allow amateurs to remix both professional and other amateur content if the remix is noncommercial. Of course, the basic terms—what constitutes “remix,” “noncommercial,” and “amateur”—would need to be defined, as best possible, preferably in the statute. Like most legal terms, these terms would almost certainly produce difficult line-drawing in some cases. Yet the choice between the uncertainty that exists today in copyright law and Lessig’s specific exemption strikes me as a no-brainer in favor of the latter.

More generally, it is noteworthy that all of Lessig’s specific copyright proposals are directed at Congress (he also discusses the need to “reform us” and recognize the limits of regulation). The courts do play a role in the common-law development of copyright doctrines, but all of the reforms Lessig offers would require legislation by Congress. The last major revision of the Copyright Act was in 1976, well before the Internet and digital technologies. As Lessig suggests, it may well be time for the next major revision.¹³⁰

Finally, it is hard not to read *Remix* as a coda to Lessig’s earlier work in *Code*. For those like myself in the copyright field who have learned so much from his work, Lessig’s decision to turn his scholarly writing elsewhere is a huge loss. But our loss is the political reformer’s gain. Lessig has already shifted his focus to political reform and his Change Congress initiative. Perhaps fittingly, Lessig has moved from Stanford and the heart of Silicon Valley back to Harvard, where he will head the Edmond J. Safra Foundation Center for Ethics.¹³¹ At the end of *Remix*, Lessig alludes to his next agenda: “Our government is fundamentally irrational for a fundamentally rational reason: policy follows not sense, but dollars.”¹³² Lessig’s next move is tackling the corruption of the political system by the influence of money—which he believes is a reason that sensible reforms to copyright law and other areas are not considered, much less enacted by Congress.

It is perhaps only fitting then that Lessig has remixed, as it were, his scholarly and professional agenda. Like a consummate remixer, Lessig is able to see and draw connections between seemingly

¹³⁰ *Id.*

¹³¹ See Lawrence Lessig Named Professor of Law at HLS, Director of Harvard’s Edmond J. Safra Foundation Center for Ethics, Harvard Law School website, Dec. 12, 2008, http://www.law.harvard.edu/news/2008/12/12_lessig.html.

¹³² LESSIG, *supra* note 8, at 294.

disparate areas in ways that are at once illuminating, creative, and even breathtaking. Only time will tell what the next decade will bring in terms of Lessig's political reform agenda. But for those of us who study the intersection between copyright law and the Internet, the last decade of Lessig's work has left us with a lifetime to ponder.